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OPINION ON TRANSFER FROM THE CALIFORNIA SUPREME COURT

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. SHAQUILLE KASIYA JORDAN et al., Defendants and Appellants.	D064010 (Super. Ct. No. SCD234048)

APPEALS from judgments of the Superior Court of San Diego County, Kerry Wells, Judge. Affirmed and remanded with directions.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant Shaquille Kasiya Jordan.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant Seandell Lee Jones.

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant and Appellant Rashon Jay Abernathy.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Lynne G. McGinnis and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

Based on a robbery and killing that occurred on May 11, 2011, when each of the defendants was 17 years old, Rashon Jay Abernathy, Seandell Lee Dupree Jones and Shaquille Kasiya Jordan (collectively, defendants) were found guilty of first degree murder (Pen. Code, §§ 187, subd. (a), 189);[1] two counts of robbery (§ 211); shooting at an occupied motor vehicle (§ 246); and unlawfully taking and driving a vehicle (Veh. Code, § 10851, subd. (a)). Based on a different incident on May 5, 2011, the jury also found Abernathy guilty of an additional count of robbery (§ 211). The jury made true findings that Abernathy personally used a firearm during the robberies, the murder and the shooting at an occupied vehicle. (§ 12022.53, subds. (b), (d).)

The trial court sentenced Jones and Jordan to a prison term of 25 years to life and sentenced Abernathy to a prison term of 50 years to life.

On appeal, all three defendants contend that (1) the trial court prejudicially erred in failing to instruct that, for the purposes of the felony-murder rule, the jury must find that the target felony (robbery) ended at the point defendants reached a place of temporary safety, known as "the escape rule"; (2) the sentences imposed by the trial court

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1 Unless otherwise indicated, all further statutory references are to the Penal Code.

are unconstitutional under either the federal or state Constitutions because they constitute cruel and unusual punishment; and (3) at sentencing, the trial court incorrectly calculated the defendants' presentence custody credits. Jones and Abernathy further contend insufficient evidence supports their convictions for unlawfully taking or driving a vehicle, and Jones contends the abstract of judgment does not accurately reflect that his five-year sentence for shooting at an occupied vehicle in count 4 was stayed by the trial court pursuant to section 654.

We originally issued an opinion deciding defendants' appeals on March 16, 2015. The Supreme Court granted defendants' petitions for review on July 8, 2015. On August 17, 2016, the Supreme Court transferred this matter to us with directions to vacate our March 16, 2015 decision and to reconsider the cause in light of *People v. Franklin* (2016) 63 Cal.4th 261, 283-284 (*Franklin*). We directed the parties to submit supplemental briefing regarding *Franklin* and any other matter arising after our original decision.

We conclude that (1) although the trial court erred in failing to instruct with the escape rule for felony murder, the error was not prejudicial; (2) sufficient evidence supports Abernathy's and Jones's conviction for unlawfully taking or driving a vehicle; (3) there is no merit to the defendants' contention that their sentences constitute cruel and unusual punishment, but consistent with *Franklin*, the trial court shall consider on remand whether defendants were afforded a sufficient opportunity to include in the record the kind of information relevant at a youth offender parole hearing, and if not, to allow them to make such a record; (4) Abernathy's and Jordan's judgments should be modified to

award an additional day of presentence custody credit; and (5) a clerical error in Jones's abstract of judgment must be corrected to reflect that the sentence on count 4 is stayed pursuant to section 654. Accordingly, we modify the judgment as to Abernathy and Jordan to award an additional day of presentence custody credit, and we order that the abstract of judgment be corrected as to Jones to accurately reflect that his sentence on count 4 is stayed. We also remand this matter to the trial court to determine whether the defendants were afforded a sufficient opportunity to make a record of information relevant to an eventual youth offender parole hearing, and if not, to allow defendants to make such a record. In all other respects, the judgments are affirmed.

I

FACTUAL AND PROCEDURAL BACKGROUND

In May 2011, Abernathy placed an advertisement on Craigslist claiming that he had a MacBook Pro computer to sell for $900. After Abernathy communicated with a potential buyer, Erick Castillo, by exchanging text messages, Abernathy met with Castillo at a recreation center on May 5, 2011. Abernathy brought along a friend for the transaction, but the other two defendants were not involved. When Castillo took out $600 in cash to pay for the computer, Abernathy's friend grabbed the money and ran away with Abernathy. Castillo chased them, and as Castillo came closer, Abernathy pulled out a gun and pointed it at Castillo, stating "I'm going to fucking kill you." Castillo gave up the chase and called 911.

A second robbery occurred on May 11, 2011, and involved Abernathy, Jones and Jordan. Using the same Craigslist advertisement, Abernathy arranged to meet with 18-

year-old Garrett Berki in front of a school around 9:15 p.m. Berki brought his girlfriend, Alejandra Faudoa, along in the car for the transaction. After waiting in front of the school for a few minutes, Berki got a call from Abernathy stating that the meeting place had changed to an apartment complex in the neighborhood. Berki drove to the new location, where Abernathy and Jones were waiting outside. Abernathy insisted that Berki show him the money before handing over the computer. During the discussion, Jones either showed Berki a gun or pointed it at him, stating that Abernathy would count the money. Berki handed over the money, and Abernathy demanded that Berki and Faudoa give him their cell phones. Abernathy and Jones then ran away through the apartment complex with a total of $640 and the two cell phones.

According to Abernathy, he got to the scene of the May 11 robbery after being picked up from home in a Honda driven by Jordan, in which Jones was a passenger. Jordan parked near the apartment complex and dropped off Abernathy and Jones so that they could commit the robbery. After the robbery Abernathy and Jones ran back to the Honda, and the three defendants decided to go to a nearby house where Jones's and Jordan's girlfriends lived. According to Abernathy, they stayed at the house for a few minutes but then were asked to leave, so they started driving toward a shopping mall.

Meanwhile, after being robbed, Berki and Faudoa sat in their car for a few minutes before deciding that Berki would drive to the police station to report the robbery. When Berki had driven one or two blocks from the scene of the robbery, he noticed Jordan, Jones and Abernathy in the Honda driving toward him. Berki and Faudoa decided to follow the Honda so that they could get the license plate number. Berki followed the

Honda in and out of a parking lot and then through the streets and onto a freeway. Berki was driving close behind the Honda to try to see the license plate, and he was also driving in a manner that he hoped might attract the attention of the police, such as pulling directly in front of the Honda and putting on his brakes.

The Honda exited the freeway while Berki's car was in front of it, but Berki managed to drive over the freeway shoulder and down the off-ramp, following the Honda into a residential neighborhood. Both cars ended up on a dead-end street. Berki stopped his car at an angle before the end of the cul-de-sac while the Honda turned around at the end of the cul-de-sac and drove up next to Berki's car. Abernathy pointed a gun out of a backseat window of the Honda and fired one shot into Berki's car. Berki was shot in the left chest and was pronounced dead at the hospital a short time later.

The defendants drove a few blocks away, crashed the Honda and fled into the backyards of the residential neighborhood, where police located them by use of infrared helicopter cameras and K-9 units. After being arrested, Jones, Jordan and Abernathy were taken to the police station, where they made numerous statements connecting themselves to the crimes in a recorded jail cell conversation. Further, it was discovered that the Honda in which the defendants were riding had been stolen a few hours before the second robbery, either on the night of May 10 or the morning of May 11, 2011.

Based on the events of May 11, 2011, Abernathy, Jones and Jordan were each charged with first degree murder (§§ 187, subd. (a), 189); two counts of robbery (§ 211); shooting at an occupied motor vehicle (§ 246); and unlawfully taking and driving a vehicle (Veh. Code, § 10851, subd. (a)). Based on the May 5, 2011 robbery, Abernathy

was charged with an additional count of robbery (§ 211). The information also included gang allegations for each count as to each defendant (§ 186.22, subd. (b)(1)), and allegations as to each count (except the count for unlawfully taking or driving a vehicle) that a principal personally used a firearm in committing the crimes (§ 12022.53, subd. (b), (d), (e)(1)).

When Abernathy testified at trial, he admitted to committing both robberies and to shooting Berki, but he contended that the shooting was an accident caused by an inadvertent discharge of the gun. Abernathy also testified that he did not know that Jordan was driving a stolen vehicle until Jordan informed him of that fact when he got back into the Honda after the second robbery. Jordan and Jones did not testify at trial.

The jury found the defendants guilty on all counts but did not make a true finding on the gang allegations and found the firearm allegations to be true only as to Abernathy. The trial court sentenced Jones and Jordan to prison for 25 years to life and sentenced Abernathy to prison for 50 years to life.

II

DISCUSSION

A. *The Error in Instructing the Jury on the Escape Rule for Felony Murder Was Harmless Beyond a Reasonable Doubt*

We first consider the contention, advanced by all three defendants, that the trial court prejudicially erred in failing to instruct on the escape rule for felony murder. There is no dispute that the trial court erred. Indeed, as the trial court acknowledged in ruling on posttrial motions, our Supreme Court's opinion in *People v. Wilkins* (2013) 56 Cal.4th

333 (*Wilkins*) — issued *after* the verdict in this case — establishes that the trial court's instruction on felony murder was incorrect. However, as we will explain, we agree with the trial court's conclusion that the error was harmless because, based on the jury's findings on other issues, it is clear beyond a reasonable doubt that the jury would have reached the same verdict on the murder counts had it been properly instructed with the escape rule for felony murder.

1. *The Escape Rule as Applied to Felony Murder*

We first examine the applicable legal principles under the felony-murder rule. Here, all three defendants were charged with murder under the felony-murder rule, based on the allegation that Berki's death occurred during the commission of a robbery.[2] Under the felony-murder rule, "[a]ll murder . . . which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, [or] train wrecking . . . is murder of the first degree." (§ 189.) " 'Under the felony-murder rule, a strict causal or temporal relationship between the felony and the murder is not required; what is required is proof beyond a reasonable doubt that the felony and murder were part of *one continuous transaction*.' " (*Wilkins*, *supra*, 56 Cal.4th at p. 340, italics added.)

Prior to our Supreme Court's recent opinion in *Wilkins*, the discussion in *People v. Cavitt* (2004) 33 Cal.4th 187 (*Cavitt*) created uncertainty about what constitutes one

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2 As the shooter, Abernathy was also prosecuted for first degree murder under two other theories identified in section 189, namely, (1) he killed willfully with premeditation and deliberation, and (2) he intentionally discharged a firearm from a motor vehicle at another person outside of the vehicle with the intent to inflict death.

continuous transaction in the context of the felony-murder rule. Specifically, the uncertainty involved the issue of whether, in the context of felony murder, the target felony continues only until the perpetrator has reached a *place of temporary safety*, which is a concept referred to as the escape rule. (See *Wilkins*, *supra*, 56 Cal.4th at pp. 341-342 [explaining uncertainty as to the application of the escape rule in a felony-murder context caused by *Cavitt*].) The escape rule is used in contexts other than felony murder to determine whether an act occurred in the commission of a crime, such as to determine whether a defendant used a firearm in commission of a crime, committed a kidnapping during a crime, or inflicted great bodily injury during a crime. (*Wilkins*, at p. 341, citing cases.) CALCRIM No. 3261 accordingly sets forth the escape rule for use in those contexts. However, based on *Cavitt*, the bench notes to CALCRIM No. 3261 at the time of defendants' trial specifically *disapproved* instructing the jury on the escape rule in the context of felony murder, stating that the instruction " 'should *not* be given in a felony-murder case to explain the required temporal connection between the felony and the killing.' " (*Wilkins*, at p. 341, citing Judicial Council of Cal., Crim. Jury Instns. (2012) Bench Notes to CALCRIM No. 3261, p. 990.)[3]

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3 As modified to apply to a robbery case, CALCRIM No. 3261 states in relevant part:

"[The crime of robbery [or attempted robbery] continues until the perpetrator[s] (has/have) actually reached a place of temporary safety.

"The perpetrator[s] (has/have) reached a place of temporary safety if:

- (He/She/They) (has/have) successfully escaped from the scene; [and]
- (He/She/They) (is/are) not or (is/are) no longer being chased(; [and]/.)
- [(He/She/They) (has/have) unchallenged possession of the property(; [and]/.)]

Relying on *Cavitt* and the CALCRIM bench notes, the trial court here declined defendants' requests to instruct the jury with the escape rule for the felony-murder count. Under the instruction requested by defense counsel, but rejected by the trial court, the jury would have been informed that a robbery continues for the purpose of the felony-murder rule only until the perpetrators have reached a place of temporary safety. Instead, the trial court instructed the jury with a modified version of former CALCRIM No. 549, which set forth several nonexclusive factors for the jury to consider in determining whether a robbery and a murder constitute one continuous transaction for the purposes of the felony-murder rule.[4]

• [(He/She/They) (is/are) no longer in continuous physical control of the person who is the target of the robbery.]]"

4 Former CALCRIM No. 549, as given by the trial court, stated:

"A killing is committed during the commission of a robbery under the felony murder rule if the People have proved beyond a reasonable doubt that the robbery and the act causing death are part of one continuous transaction. The continuous transaction may occur over a period of time and in more than one location. There is no requirement that the act causing death occur while committing or while engaged in the robbery or that the killing be part of the robbery, so long as the People have proved the two acts are part of one continuous transaction.

"In deciding whether the killing and the robbery were part of one *continuous transaction*, you may consider the following factors: [¶] 1. Whether the felony and the fatal act occurred at the same place; [¶] 2. The time period, if any, between the robbery and the fatal act; [¶] 3. Whether the fatal act was committed for the purpose of aiding the commission of the robbery or escape after the robbery; [¶] 4. Whether the fatal act occurred after the felony but while one or more of the perpetrators continued to exercise control over the person who was the target of the felony; [¶] 5. Whether the fatal act occurred while the perpetrators were fleeing from the scene of the robbery or otherwise trying to prevent the discovery or reporting of the crime; [¶] 6. Whether the robbery was the direct cause of death; [¶] AND [¶] 7. Whether the death was a natural and probable consequence of the robbery.

The trial here took place in October and November 2012. In March 2013, before sentencing in this case, our Supreme Court decided *Wilkins, supra,* 56 Cal.4th 333. In *Wilkins*, the Supreme Court explained that despite any uncertainty caused by *Cavitt*, the escape rule *does* apply in a felony-murder context, so that liability for felony murder ends at the point that the perpetrator reaches a place of temporary safety. *Wilkins* stated,

" 'Felony-murder liability continues throughout the flight of a perpetrator from the scene of a robbery *until the perpetrator reaches a place of temporary safety* because the robbery and the accidental death, in such a case, are parts of a "continuous transaction." ' . . . When the killing occurs during flight, . . . the escape rule establishes the '*outer limits* of the "continuous-transaction" theory.' . . . 'Flight following a felony is considered part of the same transaction *as long as the felon has not reached a "place of temporary safety."* ' " (*Id*. at p. 345, citations omitted, some italics added.)

Shortly after *Wilkins* was issued, the trial court notified the parties of the opinion and invited briefing. The defendants thereafter filed motions for a new trial based on *Wilkins*, arguing that the jury had been misinstructed on felony murder. In ruling on the motions, the trial court concluded that it *had* misinstructed the jury because it did not instruct with the escape rule for felony murder. However, the trial court concluded that the error was harmless beyond a reasonable doubt because the jury had been instructed with the escape rule as to the firearm allegations and the crime of shooting at an occupied

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"It is not required that the People prove any of these factors or any particular combination of these factors. This is not an exclusive list. The factors are given to assist you in deciding whether the fatal act and the robbery were part of one continuous transaction."

vehicle. As the trial court explained, based on the jury's findings on those issues, the jury necessarily found that the defendants had not reached a place of temporary safety before Abernathy shot Berki, and thus, had the jury been properly instructed on the escape rule for felony murder, it would have found that the defendants had not reached a place of temporary safety before the killing.

2. *The Error Was Harmless Beyond a Reasonable Doubt*

For the purposes of our analysis, we begin with the premise, as do the parties, that the trial court erred in failing to instruct the jury that the escape rule applies to the felony-murder counts. Specifically, after *Wilkins* it is clear that, with respect to felony murder, instead of instructing that the jury could find the robbery and the killing to be part of one continuous transaction based on several nonexclusive factors, including "[w]hether the fatal act occurred while the perpetrators were fleeing from the scene of the robbery or otherwise trying to prevent the discovery or reporting of the crime" (former CALCRIM No. 549, as given), the jury should have been instructed that the robbery and the killing *could not* be part of one continuous transaction if the defendants reached a place of temporary safety before the killing.

The only disputed issue for us to resolve is whether the instructional error was prejudicial. *Wilkins* establishes that an error in failing to instruct the jury on the escape rule for felony murder is a federal constitutional error because the error amounts to a misinstruction on an element of first degree murder. (*Wilkins*, *supra*, 56 Cal.4th at p. 350.) Applying the standard of prejudice applicable to federal constitutional error, we

therefore examine " 'whether it appears " ' "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ' " ' " (*Ibid*.)

An instructional error is harmless beyond a reasonable doubt if " '[t]he factual question posed by the omitted instruction was necessarily resolved adversely to defendant under other, properly given instructions.' " (*People v. Pulido* (1997) 15 Cal.4th 713, 726.) Here, as we will explain, the jury was instructed on the escape rule under two other instructions and necessarily made findings on the escape rule adverse to the defendants in connection with those instructions. Based on those findings, we can safely conclude that the jury determined the defendants had *not* reached a place of temporary safety before the killing.

First, we explain why the instructional error was harmless as to Jones and Jordan. Those two defendants were prosecuted for shooting at an occupied motor vehicle in count 4 under the sole theory that they were guilty as aiders and abettors under the natural and probable consequences doctrine. As the jury was instructed, for the natural and probable consequences doctrine to apply, it must find that "[*d*]*uring the commission of*" the robbery, a coparticipant (i.e., Abernathy) committed the crime of shooting at an occupied motor vehicle, and that the shooting was a natural and probable consequence of the robbery.

The jury was further instructed to use the escape rule to determine whether the shooting occurred during the commission of the robbery for the purposes of the natural and probable consequences. Specifically, the jury was instructed with a modification of CALCRIM No. 3261, as follows: "For purposes of determining whether the crime of

Shooting at an Occupied Vehicle was committed as a natural and probable consequence of robbery, the crime of robbery continues until the perpetrators have actually reached a temporary place of safety. [¶] The perpetrators have reached a temporary place of safety if: [¶] They have successfully escaped from the scene; [¶] They are no longer being chased; AND [¶] They have unchallenged possession of the property." Having been instructed with the modification of CALCRIM No. 3261, as quoted above, the jury found Jones and Jordan guilty of shooting at an occupied vehicle.

In light of the instruction on the escape rule in CALCRIM No. 3261, the jury could not have found Jones and Jordan guilty of shooting at an occupied vehicle unless it also found that the defendants had *not* reached a place of temporary safety before the shooting. Therefore, based on the jury's finding with respect to the natural and probable consequences doctrine for count 4, we can determine beyond a reasonable doubt what finding the jury would have made had it been properly instructed with the escape rule for felony murder. Specifically, based on the jury's verdict on the natural and probable consequences doctrine for count 4, if properly instructed on the escape rule for felony murder, it is clear that the jury would have found that Jones and Jordan *did not* reach a place of temporary safety before the shooting, so that the robbery and the murder were part of one continuous transaction as required for a guilty verdict on felony murder. The instructional error in failing to instruct on the escape rule for felony murder was therefore harmless beyond a reasonable doubt as to Jones and Jordan.

Second, we explain why the instructional error was harmless as to Abernathy. The jury was instructed with the escape rule in the context of the firearm allegations against

Abernathy. Specifically, Abernathy was alleged to have personally and intentionally discharged a firearm causing death while committing the May 11 robbery, the murder of Berki and while shooting at an occupied vehicle. (§ 12022.53, subd. (d).) As the jury was instructed, to make a true finding on those firearm allegations as to each crime, it had to find, among other things, that Abernathy "personally discharged a firearm *during the commission of that crime*." (Italics added.)

To help the jury determine whether Abernathy personally discharged a firearm during the crimes, the trial court instructed with a modification of CALCRIM No. 3261 that for the purposes of "Personally Using Firearm: Causing Death . . . , the crime of robbery continues until the perpetrators have actually reached a temporary place of safety. [¶] The perpetrators have reached a temporary place of safety if: [¶] They have successfully escaped from the scene; [¶] They are no longer being chased; AND [¶] They have unchallenged possession of the property."

The jury made a true finding that Abernathy personally and intentionally discharged a firearm during the robbery of Berki and Faudoa, during the murder of Berki and while committing the crime of shooting at an occupied vehicle. We know that the only time Abernathy personally discharged a firearm during the events of May 11 was when he shot Berki in the cul-de-sac after the car chase. Therefore, in concluding that Abernathy personally discharged a firearm during the robbery of Berki and Faudoa, the

jury necessarily concluded that the robbery continued until the end of the car chase, when Abernathy shot Berki.[5]

In light of the instruction on the escape rule in CALCRIM No. 3261, the jury could not have found that the robbery continued until Abernathy shot Berki unless it also found that Abernathy did *not* reach a place of temporary safety before the shooting. We can therefore determine, beyond a reasonable doubt, based on the jury's true finding on the firearm allegations for the robbery counts, that if the jury had been properly instructed that the escape rule applied to felony murder, it would have concluded that Abernathy did *not* reach a place of temporary safety before the shooting. If properly instructed, the jury accordingly would have found that the robbery and the murder were part of one continuous transaction for the purposes of felony murder. The instructional error in

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[5] Jordan and Jones argue that because the jury found the firearm allegations against them to be unproven, and the jury was instructed on the escape rule to determine whether a firearm was discharged during the commission of the crimes for the purposes of those firearm enhancements, the jury must have determined that the escape rule was not satisfied as to Jordan and Jones. The argument lacks merit. In contrast to the firearm allegations that the jury found to be true as to Abernathy for *personally* discharging a firearm under section 12022.53, subdivision (d), the only firearm enhancements alleged against Jordan and Jones were *gang-related* firearm enhancements, applicable to defendants who do not personally discharge a firearm, but who commit a gang-related crime together with the shooter. (§ 12022.53, subds. (d), (e)(1).) The jury was instructed that to make a true finding on the firearm allegations against Jordan and Jones as to each of the applicable counts, it was required to find that the defendants "committed those crimes for the benefit of, at the direction of, or in association with a criminal street gang with the intent to promote, further, or assist in any criminal conduct by gang members." The jury specifically found that the crimes were *not* gang related, requiring that they also find that the gang-related firearms allegations against Jordan and Jones were unproven. Therefore the jury's rejection of the firearm allegations against Jordan and Jones does *not* mean that the jury found that the escape rule was not satisfied as to them.

failing to instruct on the escape rule for felony murder was therefore harmless beyond a reasonable doubt as to Abernathy as well.

The defendants argue that the instructional error was nevertheless prejudicial — even in light of the finding on the escape rule in the context of the natural and probable consequences doctrine for count 4 against Jones and Jordan and the firearm allegations against Abernathy — because the jury must have been confused by the different standards in former CALCRIM No. 549 and CALCRIM No. 3261 for determining whether the robbery continued until the shooting.[6] According to defendants, we cannot be certain that the jury properly applied the escape rule as described in CALCRIM No. 3261 because its analysis may have been tainted by the different standards set forth in former CALCRIM No. 549 for deciding whether the robbery and the shooting were one continuous transaction for the purpose of felony murder.

Based on our review of the record, we perceive no indication of any confusion caused by the fact that the jury was instructed with former CALCRIM No. 549 as well as

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6 Defendants cite *Wilkin*'s statement, made in a slightly different context, that it could be "confusing or misleading" if a trial court instructed with both CALCRIM No. 3261 and former CALCRIM No. 549. (*Wilkins, supra*, 56 Cal.4th at p. 348, fn. 4.) Defendants' citation to *Wilkins* does not advance their argument. *Wilkins* posited that it would be confusing and misleading for trial courts to fashion an instruction on the escape rule for felony murder by giving both CALCRIM No. 3261 and former CALCRIM No. 549 together. Here, of course, both instructions were *not* given in an attempt to instruct on the escape rule for felony murder. Instead, the trial court gave both instructions because it concluded that the escape rule instruction in CALCRIM No. 3261 was warranted for the count of shooting at an occupied vehicle and the firearm allegations, and former CALCRIM No. 549, in contrast, was needed to explain the one continuous transaction doctrine for felony murder, and the distinction was made clear to the jury.

CALCRIM No. 3261. We therefore perceive no problem with relying on the jury's findings as to the duration of the robbery in the context of the natural and probable consequences doctrine for count 4 and the firearm allegations in conducting our harmless error analysis. Indeed, during closing arguments the difference in the standards for determining the duration of the robbery as set forth in former CALCRIM No. 549 and CALCRIM No. 3261 was extensively explained to the jury, and that explanation would have dispelled any confusion that could have been caused by the conflicting standards in the two instructions.[7]

We accordingly conclude that the trial court's error in failing to instruct on the escape rule for felony murder was harmless beyond a reasonable doubt as to each of the defendants.

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[7] Specifically, during closing argument the prosecutor explained that the time frame involved in the question of whether the defendants had reached a place of temporary safety before the shooting is "different than the felony[-]murder one continuous transaction. This is what's known as the escape rule. It's going to sound similar because, again, you can use this as a factor to determine if it's one continuous transaction, but it is not the same thing." The prosecutor explained, "You can have the defendants reach a place of temporary safety and still have felony murder and still have one continuous transaction. They both can coexist." In his rebuttal argument, the prosecutor again returned to the contrast between the two instructions. "The jury instructions define robbery for you and how long this takes. For felony murder, it takes as long as the one continuous transaction doctrine. For natural and probable consequences and for gun usage, it takes as long as the escape rule says. The escape rule is not as long as the one continuous transaction. The one continuous transaction extends beyond the escape rule." Counsel for Jones also spent a considerable portion of his closing argument describing the two different instructions for determining the duration of the robbery. Specifically, he described at length both the question of whether the defendants had reached a place of temporary safety for the purpose of the natural and probable consequences doctrine as well as the multi-factored test for determining in the context of felony murder whether the robbery and the shooting were part of one continuous transaction.

B. *Sufficient Evidence Supports the Conviction for Unlawfully Taking or Driving a Vehicle Against Jones and Abernathy*

We next consider Jones's and Abernathy's argument that insufficient evidence supports their conviction in count 5 for unlawfully taking or driving a vehicle (Veh. Code, § 10851, subd. (a)).

All three defendants were convicted of violating Vehicle Code section 10851, subdivision (a), which provides: "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense . . . ."

As we have explained, the evidence established that the Honda being driven by Jordan on May 11, 2011, during the robbery and murder had been stolen while parked on the street sometime either late on May 10 or early on May 11. Jordan, who was the driver of the stolen Honda, does not challenge the sufficiency of the evidence to support his conviction for unlawfully taking or driving in violation of Vehicle Code section 10851, subdivision (a).

However, Jones and Abernathy contend that because they were *passengers* in the Honda, not the driver, and there is no evidence connecting them to the initial act of *stealing* the Honda, there is insufficient evidence to convict them under Vehicle Code section 10851, subdivision (a).

In considering a challenge to the sufficiency of the evidence, "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence — that is, evidence that is reasonable, credible, and of solid value — from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. . . . We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. . . . If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. . . . 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' " (*People v. Albillar* (2010) 51 Cal.4th 47, 60, citations omitted.)

We begin our analysis with a review of the applicable legal standards. As relevant here, Vehicle Code section 10851, subdivision (a) contains plain language establishing that criminal liability is not limited to the person who drives or steals a vehicle, but that it also extends to "any person who is *a party* or *an accessory to* or an *accomplice in* the driving or unauthorized taking or stealing." (*Ibid*., italics added.) In *People v. Clark* (1967) 251 Cal.App.2d 868, 874 (*Clark*), the court considered the extent to which a passenger in a stolen vehicle may be criminally liable under the portion of the statute applying to someone who is an accessory, an accomplice or a party to driving a stolen vehicle. As *Clark* explained, establishing guilt under that theory "requires proof of more than mere presence in the automobile. *At a minimum, defendant must have known that the vehicle had been unlawfully acquired and must have had that knowledge at a time when he could be said to have, in some way, aided or assisted in the driving*. Knowledge

of the unlawful taking, acquired after the ride started and when defendant could neither stop the trip nor leave the vehicle is not enough." (*Ibid*., italics added.)

Although sparse additional case law exists describing the circumstances in which a passenger in a stolen vehicle will be criminally liable for unlawfully driving the vehicle, case law in the analogous context of a passenger prosecuted for *receiving* a stolen vehicle under section 496 is instructive. A conviction for receiving a stolen vehicle requires, among other things that the passenger have *actual or constructive possession* of the vehicle, even though the stolen vehicle is being driven by someone else. (*People v. Land* (1994) 30 Cal.App.4th 220, 223 (*Land*).) The question of whether a passenger in a stolen vehicle had constructive possession "turns on the unique factual circumstances of each case." (*Id*. at p. 228.) In *Land*, the evidence supported a finding that the passenger had constructive possession of the stolen vehicle because of the passenger's "close relationship to the driver, use of the vehicle for a common criminal mission, and stops along the way before abandoning it (during which [the passenger] apparently made no effort to disassociate himself from his friend or the stolen vehicle)." (*Ibid*.)

Applying *Clark* and *Land*, we conclude that substantial evidence supports a finding that although Jones and Abernathy were passengers in the stolen Honda being driven by Jordan, they were parties to, accessories to or accomplices in the driving of the stolen Honda.

As required by *Clark*, there is evidence that Jones and Abernathy "kn[ew] that the vehicle had been unlawfully acquired and . . . had that knowledge at a time when [they] could be said to have, in some way, aided or assisted in the driving." (*Clark*, *supra*, 251

Cal.App.2d at p. 874.) Specifically, although Abernathy denied knowing before the robbery that the Honda was stolen, he testified that as soon as he and Jones arrived back at the Honda after robbing Berki and Faudoa, Jordan informed them that because the Honda was stolen, he did not want to have a gun in the car. According to Abernathy's testimony, after acquiring knowledge that the Honda was stolen, he and Jones nevertheless drove in the Honda to visit Jordan's and Jones's girlfriends and after that stop, they once again got in the stolen Honda before being chased by Berki. Under the scenario described by Abernathy, there was ample opportunity for both Jones and Abernathy to decide to cease being passengers in the stolen Honda. This situation is accordingly not, as described in *Clark*, an instance where the defendants have no criminal liability because they found out that the car was stolen "after the ride started and when [they] could neither stop the trip nor leave the vehicle." (*Ibid*.)

In addition, there are several similarities between this case and the circumstances described in *Land* to support a finding that Jones and Abernathy were parties, accessories or accomplices to driving the stolen vehicle. Specifically, (1) Jones and Abernathy had a "close relationship to the driver," in that all three defendants were friends; (2) all three defendants made "use of the vehicle for a common criminal mission"; and (3) the defendants made "stops along the way before abandoning [the vehicle] (during which [Jones and Abernathy] apparently made no effort to disassociate [themselves] from [their] friend or the stolen vehicle)." (*Land, supra*, 30 Cal.App.4th at p. 228.)

Accordingly, based on the evidence at trial, a reasonable juror could determine that although they were passengers in the stolen Honda driven by Jordan, both Jones and Abernathy were nevertheless guilty of unlawfully taking or driving the vehicle.

C. *Defendants' Challenge to Their Sentences as Cruel and Unusual Punishment*

As we have described, each of the defendants was 17 years old when committing the crimes at issue. Based on that fact, the defendants contend that the trial court violated the prohibition on cruel and unusual punishment in the Eighth Amendment to the United States Constitution by sentencing them to indeterminate life terms in prison (50 years to life for Abernathy and 25 years to life for Jones and Jordan). Further, Jones and Jordan contend that because they were not shooters during the murder, and in light of their age at the time of the crime, their sentences are disproportionate to their crimes and therefore constitute cruel and unusual punishment in violation of the federal and state Constitutions.

We apply a de novo standard of review to these issues. (*People v. Em* (2009) 171 Cal.App.4th 964, 971 (*Em*) [" 'Whether a punishment is cruel or unusual is a question of law for the appellate court . . . .' "].)

1. *Abernathy's Sentence*

We first consider Abernathy's contention that because he was 17 years old at the time of the murder, a sentence of 50 years to life constitutes cruel and unusual punishment.

As the trial court described at sentencing, based on the crimes for which Abernathy was convicted, the longest sentence that the trial court could impose on

Abernathy (if it selected midterm sentences for the determinate terms), was 83 years to life. Further, based on a mandatory 25-year-to-life sentence for the first degree murder conviction (§ 190, subd. (a)), plus a mandatory 25-year-to-life sentence for the firearm enhancement (§ 12022.53, subd.(d)), the shortest sentence that the trial court could impose on Abernathy was 50 years to life, even if all the sentences for the other counts were run concurrently or stayed. Abernathy argued to the trial court that a sentence of 50 years to life would be a mandatory de facto life sentence without parole, given his actuarial life expectancy of 64.6 years as a Black male born in 1993, in that he would not be eligible for release from prison (taking into account his credits) until the age of 67 at the earliest.

The trial court acknowledged that given Abernathy's life expectancy, "an argument could be made" that the required minimum sentence of 50 years to life was a de facto life sentence without parole. The trial court therefore proceeded to apply the approach required by the controlling United States Supreme Court case law, *Miller v. Alabama* (2012) 567 U.S. ___, 132 S.Ct. 2455 (*Miller*), which explains how the Eighth Amendment's prohibition on cruel and unusual punishment applies to a defendant who, like Abernathy, committed a homicide before the age of 18. Applying the approach required by *Miller*, the trial court concluded that based on the circumstances of Abernathy's case, including the age and maturity level at which Abernathy committed the murder, Abernathy's family and social background, and the details of the crime, a

sentence of 50 years to life did not constitute cruel and unusual punishment, and it accordingly imposed that sentence.[8]

a. *Applicable Case Law*

In *Miller*, the United States Supreme Court considered the issue of whether the Eighth Amendment proscribes a *mandatory* life sentence without parole for a defendant convicted of a *homicide* for a killing that occurred prior to the defendant's 18th birthday. (*Miller*, *supra*, 567 U.S. ___, 132 S.Ct. 2455.) *Miller* disapproved mandatory life sentences without parole for juvenile homicide offenders, holding that a sentencing court must be given the *discretion* to consider the juvenile offender's age and youthful characteristics before deciding whether to impose a sentence of life without parole for a homicide conviction. (*Miller*, *supra*, 567 U.S. ___, 132 S.Ct. at p. 2475.)

In the course of explaining why a mandatory life without parole sentence is unconstitutional when applied to a juvenile homicide offender, *Miller* set forth the factors that a sentencing court must consider before imposing such a sentence: "Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features — among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him — and from which he cannot usually extricate himself — no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including

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8 The trial court stayed the sentence on one of the robbery counts, and ordered that the sentences for the remaining counts run concurrently to the 50-year-to-life term for the murder and the firearm enhancement.

the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth — for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. [Citations.] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." (*Miller*, *supra*, 567 U.S. ___, 132 S.Ct. at p. 2468.) As *Miller* explained, "given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' [Citations.] Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Id*. at p. 2469.)

In *Franklin* our Supreme Court held that the protections outlined in *Miller* apply to a sentence for a juvenile offender that is the *functional equivalent* of a sentence of life without parole. (*Franklin*, *supra*, 63 Cal.4th at p. 276.)

After Abernathy's sentencing in May 2013, "the Legislature passed Senate Bill No. 260, which became effective January 1, 2014, and added sections 3051, 3046,

subdivision (c), and 4801, subdivision (c) to the Penal Code." (*Franklin, supra,* 63 Cal.4th at p. 276; see also Stats. 2013, ch. 312, § 4.) "At the heart of Senate Bill No. 260 was the addition of section 3051, which requires the Board [of Parole Hearings] to conduct a 'youth offender parole hearing' during the 15th, 20th, or 25th year of a juvenile offender's incarceration. (§ 3051, subd. (b).) The date of the hearing depends on the offender's ' "controlling offense," ' which is defined as 'the offense or enhancement for which any sentencing court imposed the longest term of imprisonment.' (*Id.,* subd. (a)(2)(B).) A juvenile offender whose controlling offense carries a term of 25 years to life or greater is 'eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.' (*Id.,* subd. (b)(3).)" (*Franklin, supra,* 63 Cal.4th at p. 277.)[9] "Section 3051 . . . reflects the Legislature's judgment that 25 years is the maximum amount of time that a juvenile offender may serve before becoming eligible for parole. Apart from the categories of offenders expressly excluded by the statute, section 3051 provides all juvenile offenders with a parole hearing during or before their 25th year of incarceration." (*Franklin, supra,* 63 Cal.4th at p. 278.)

In *Franklin*, our Supreme Court concluded that the enactment of section 3051 mooted any argument that the juvenile offender in that case, sentenced to a term of 50

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9 Although not relevant here, "the statute excludes several categories of juvenile offenders from eligibility for a youth offender parole hearing." (*Franklin, supra,* 63 Cal.4th at pp. 277-278, citing § 3051, subd. (h).)

years to life for murder, received a de facto life sentence that constituted cruel and unusual punishment under *Miller*. (*Franklin*, *supra*, 63 Cal.4th at p. 280.) The court explained that "[s]ections 3051 and 3046 have . . . superseded the statutorily mandated sentences of inmates who . . . committed their controlling offense before the age of 18" (*Id.* at p. 278), and that "the combined operation of section 3051, section 3046, subdivision (c), and section 4801 means that Franklin is now serving a life sentence that includes a meaningful opportunity for release during his 25th year of incarceration. Such a sentence is neither [life without the possibility of parole] nor its functional equivalent. Because Franklin is not serving [a life without the possibility of parole] sentence or its functional equivalent, no *Miller* claim arises here. The Legislature's enactment of Senate Bill No. 260 has rendered moot Franklin's challenge to his original sentence under *Miller*." (*Franklin*, at pp. 279-280.)

b. *Abernathy's Challenge to His Sentence Is Moot*

With the above case law in mind, we turn to Abernathy's challenge to his sentence. In his original briefing, Abernathy contended that given his life expectancy, the sentence of 50 years to life — which is the minimum sentence statutorily authorized for his crimes — is a de facto mandatory life sentence without parole. Abernathy argued that *Miller* applies to his sentence, as it does to all juvenile homicide offenders who are subject to mandatory life sentences without parole. According to Abernathy, the trial court was thus required at sentencing to exercise its discretion to consider whether, given the factors

set forth in *Miller*, it should impose a sentence of less than 50 years to life, and the trial court did not properly carry out its duty to consider the factors identified in *Miller*.[10]

Based on our Supreme Court's holding in *Franklin*, we conclude that Abernathy's constitutional challenge to his sentence as cruel and unusual punishment has been rendered moot by the Legislature's enactment of Senate Bill No. 260. As in *Franklin*, due to the provisions enacted in Senate Bill No. 260, Abernathy is now serving a life sentence that includes a meaningful opportunity for release during his 25th year of incarceration and he is accordingly not serving the equivalent of a life sentence without parole.

2. *Jones's and Jordan's Sentences*

The trial court sentenced both Jones and Jordan to prison for 25 years to life. Jordan and Jones argue that a sentence of 25 years to life constitutes cruel and unusual punishment under both the federal and state Constitutions.

a. *Federal Constitutional Argument Based on Miller*

Similar to Abernathy's argument discussed above, Jordan's and Jones's main federal constitutional argument is that their sentences constitute cruel and unusual punishment under *Miller* because the trial court did not properly apply the factors set forth in *Miller* when sentencing each of them to a term of 25 years to life.

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10 In our original decision in this matter, which was vacated by our Supreme Court, we assumed for the sake of our analysis that *Miller*, *supra*, 567 U.S. ___, 132 S.Ct. 2455, applied to Abernathy's 50-year-to-life sentence, but we concluded that the trial court complied with *Miller* in how it conducted Abernathy's sentencing. We need not revisit that issue in this opinion because we conclude that Abernathy's Eighth Amendment challenge has been rendered moot by the Legislature's enactment of Senate Bill No. 260.

We reject Jordan's and Jones's argument because the constitutional requirements set forth in *Miller* apply only when a juvenile offender is sentenced either to "lifetime incarceration without *possibility* of parole" (*Miller*, *supra*, 567 U.S. ___, 132 S.Ct. at p. 2475, italics added) or to a sentence that is the *functional equivalent* of a life term without the possibility of parole (*Franklin*, *supra*, 63 Cal.4th at p. 276).[11]

Jones and Jordan were both sentenced to a term of 25 years to life, which means that they could be paroled from prison while they are in their early forties, far before they are at the end of their life expectancy.[12] *Franklin* expressly held that "a life sentence with parole eligibility during [the defendant's] 25th year of incarceration, when he will be 41 years old," is "not the functional equivalent of [life without the possibility of parole]." (*Franklin*, *supra*, 63 Cal.4th at p. 279.) Thus based on *Franklin*, Jordan's and Jones's sentences of 25 years to life, which give them the possibility of being paroled in their early forties, is not the functional equivalent of life without parole, and *Miller* does not apply.

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11 Jordan and Jones argue that the requirements of *Miller* should apply in any case where a juvenile offender is "exposed" to a life sentence, even if there is a meaningful opportunity for parole during the defendant's life span. We reject this argument as it is clearly foreclosed by *Franklin*, which concluded that because the defendant had a meaningful *opportunity* for parole after serving 25 years of a life sentence, the defendant had no constitutional claim under *Miller*. (*Franklin*, *supra*, 63 Cal.4th at p. 280)

12 Jordan acknowledges that "he was given a 25[-]year[-]to[-]life term and thus is eligible for parole when he is in his early [forties,] possibly sooner."

Jones and Jordan also argue that because they purportedly "neither killed nor intended to kill," a sentence of 25 years to life is unconstitutional for a juvenile offender. This argument is foreclosed by *Graham v. Florida* (2010) 560 U.S. 48, which held that it was unconstitutional to sentence juvenile offenders convicted of *nonhomicide* crimes to life in prison without parole, but explained that "[a] State is not required to *guarantee* eventual freedom to a juvenile offender convicted of a nonhomicide crime[,]" and instead "must . . . give defendants . . . some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Id*. at p. 75, italics added.) A sentence of 25 years to life gives Jones and Jordan the *meaningful opportunity* to obtain release, which is all that a juvenile offender is constitutionally required to receive, regardless of whether the crime committed is classified as a homicide crime or a nonhomicide crime.[13]

b. *Disproportionate Sentences*

As a second federal constitutional argument, Jordan and Jones contend that their sentences are unconstitutional under the Eighth Amendment because they offend principles of proportionality that are applicable to all defendants, not just juvenile offenders.

As the Supreme Court has explained, "the Eighth Amendment contains a 'narrow proportionality principle,' that 'does not require strict proportionality between crime and sentence' but rather 'forbids only extreme sentences that are "grossly disproportionate" to

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13 We therefore need not address whether a defendant who neither killed nor intended to kill during the commission of first degree felony murder is guilty of a homicide crime or a nonhomicide crime for the purpose of an Eighth Amendment analysis.

the crime.' " (*Graham*, *supra*, 560 U.S. at pp. 59-60, quoting concurrence of Kennedy, J. in *Harmelin v. Michigan* (1991) 501 U.S. 957, 997, 1000-1001.) In "determining whether a sentence for a term of years is grossly disproportionate for a particular defendant's crime," "[a] court must begin by comparing the gravity of the offense and the severity of the sentence. [Citation.] '[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality' the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. [Citation.] If this comparative analysis 'validate[s] an initial judgment that [the] sentence is grossly disproportionate,' the sentence is cruel and unusual." (*Graham*, *supra*, 560 U.S. at p. 60.) "The gross disproportionality principle reserves a constitutional violation for only the extraordinary case." (*Lockyer v. Andrade* (2003) 538 U.S. 63, 77.) Jones and Jordan argue that because they were convicted under a felony-murder theory and did not directly participate in killing Berki, a comparison of the gravity of their offenses with the severity of their sentences leads to the conclusion that a prison sentence of 25 years to life is grossly disproportionate to their crimes.

In a similar argument, Jones and Jordan also rely on case law developed under the California Constitution prohibiting disproportionate sentences. Article I, section 17 of the California Constitution prohibits the infliction of "[c]ruel or unusual punishment." A sentence will not be allowed to stand under the California Constitution "if 'it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' " (*People v. Carmony* (2005) 127

Cal.App.4th 1066, 1085, citing *In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*); *People v. Dillon* (1983) 34 Cal.3d 441, 478 (*Dillon*).)

Under California law, a defendant attacking a sentence as cruel or unusual "must demonstrate his punishment is disproportionate in light of (1) the nature of the offense and the defendant's background, (2) the punishment for more serious offenses, or (3) punishment for similar offenses in other jurisdictions." (*In re Nunez* (2009) 173 Cal.App.4th 709, 725.) The defendant "need not establish all three factors—one may be sufficient [citation], but the [defendant] nevertheless must overcome a 'considerable burden' to show the sentence is disproportionate to his level of culpability [citation]. As a result, '[f]indings of disproportionality have occurred with exquisite rarity in the case law.' " (*Ibid*.) Although California case law sets forth three factors to consider in conducting a proportionality analysis, "the sole test remains . . . whether the punishment 'shocks the conscience and offends fundamental notions of human dignity.' " (*Dillon*, *supra*, 34 Cal.3d at p. 487, fn. 38.) "Successful challenges based on the traditional *Lynch-Dillon* line are extremely rare." (*Perez*, *supra*, 214 Cal.App.4th at p. 60.)

Jones and Jordan do not argue that a prison sentence of 25 years to life for first degree murder is disproportionate to (1) the punishment for more serious offenses, or (2) the punishment for first degree murder in other jurisdictions. Instead, Jordan and Jones limit their argument to the first factor described in the case law, i.e., whether their sentence is grossly disproportionate to the nature of the offense and their personal backgrounds. As this issue overlaps with the central issue posed by the federal proportionality analysis, i.e., whether the sentence is grossly disproportionate to the

gravity of the offense (*Graham*, *supra*, 560 U.S. at p. 60), we consider both the federal and state constitutional proportionality challenges together. In conducting our analysis, "[w]e examine both the seriousness of the crime in the abstract and 'the totality of the circumstances surrounding the commission of the offense . . . , including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts.' " (*Em*, *supra*, 171 Cal.App.4th at p. 972.)

Turning to the nature of the crime, felony murder committed during a robbery is a serious and dangerous crime. As our Supreme Court has observed, "when it is viewed in the abstract robbery-murder presents a very high level of such danger, second only to deliberate and premeditated murder with malice aforethought." (*Dillon*, *supra*, 34 Cal.3d at p. 479.) Jones and Jordan argue, however, that in the unique circumstances of this case, a 25-year-to-life sentence for felony murder is disproportionate to the gravity of the crime because they were not the shooters, they had minimal or nonexistent criminal history prior to this case,[14] and they were juveniles when they committed the instant offenses. As we will explain, we reject these arguments, and conclude that a sentence of 25 years to life was not grossly disproportionate to Jones's and Jordan's crime of felony murder.

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14 Jordan had no criminal history prior to this case, but the evidence at trial was that he was a documented gang member as of February 2008. Jones had several true findings as a juvenile, of increasing seriousness, for petty theft, resisting an officer, and assault with a deadly weapon during a gang-related shooting. The evidence at trial was that Jones was a documented gang member as of January 2009.

First, although Jones and Jordan did not personally shoot Berki, they were nevertheless convicted of felony murder based on their willing participation in an armed robbery. "Life sentences pass constitutional muster for those convicted of aiding and abetting murder, and for those guilty of felony murder who did not intend to kill." (*Em*, *supra*, 171 Cal.App.4th at pp. 972-973.) Indeed, in *Em*, the court rejected a similar disproportionality argument, affirming a sentence of 50 years to life for a defendant convicted of felony murder for a murder that occurred when he was 15 years old. The defendant in *Em* was not the shooter, but he was a participant in an armed robbery, during which his companion shot the person they were trying to rob. (*Id*. at pp. 967-968.) *Em* explained that "[a]lthough defendant did not shoot the gun himself, the robbery and murder took place with his culpable involvement. Defendant's participation in the crime was demonstrably not 'passive . . . .' " (*Id*. at p. 975.) As here, the facts in *Em* supported the conclusion that the "[d]efendant committed this crime, not because he was in the wrong place at the wrong time, but because he has a complete disregard for the rule of law and lack of respect for human life." (*Id*. at p. 976.)

Similar to *Em*, other cases have rejected arguments by juvenile offenders that a sentence for first degree murder violates the proportionality principle of the California Constitution even though the defendant was not the person who committed the killing, when the defendant knowingly participated in a serious crime that led to the murder. (*People v. Gonzales* (2001) 87 Cal.App.4th 1, 7, 16 [rejecting a proportionality challenge to 50-year-to-life sentences imposed on juvenile offenders for first degree murder, when the defendants were not shooters but participated in an armed attack]; *People v. Ortiz*

(1997) 57 Cal.App.4th 480, 486-487 [affirming a 26-year-to-life sentence for a 14-year-old gang member convicted of felony murder occurring when his companion shot someone during a robbery].)

Next, a focus on Jones's and Jordan's personal characteristics also results in the conclusion that the sentence is not grossly disproportionate. As case law directs, we inquire "whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Dillon*, *supra*, 34 Cal.3d at p. 479.)

As the trial court pointed out, both Jordan and Jones were culpable participants in the events leading up to the murder. Jones threatened Berki with a firearm during the robbery and demanded money. Jordan was the getaway driver in a car that he had stolen. The defendants' comments to each other in the jail cell after they were arrested showed no remorse and provided no indication that this was an exceptional circumstance where either Jordan or Jones unknowingly participated in, or were pressured to take part in, criminal activity. On the contrary, even though there was evidence at trial that Abernathy may not have been a gang member, it is undisputed that both Jordan and Jones were active members of criminal street gangs. In addition, Jones had a criminal history of escalating seriousness, which included taking part in a violent gang assault. Therefore, we do not perceive this as a situation where the defendants' personal characteristics and role in the commission of the crimes make a sentence of 25 years to life in prison a grossly disproportionate punishment for the crime of first degree murder.

Jones and Jordan argue that this case is like *Dillon, supra*, 34 Cal.3d 441, in which our Supreme Court concluded that a juvenile offender convicted of felony murder should have his punishment reduced to the applicable sentence for second degree murder based on principles of proportionality under the California Constitution. (*Dillon*, at p. 489.) In *Dillon*, the court explained that the defendant was 17 years old during the crime and had shot the victim nine times in a panic during an unsophisticated attempt to steal from a marijuana farm. (*Id*. at p. 452.) Concluding that the indeterminate life term for first degree murder was a disproportionate sentence because of the defendant's immaturity and the nature of his crime, *Dillon* explained, "at the time of the events herein defendant was an unusually immature youth. He had had no prior trouble with the law, and . . . was not the prototype of a hardened criminal who poses a grave threat to society. . . . [W]ith hindsight his response might appear unreasonable; but there is ample evidence that because of his immaturity he neither foresaw the risk he was creating nor was able to extricate himself without panicking when that risk seemed to eventuate." (*Id*. at p. 488.)

Because of the sophisticated nature of the robbery that Jordan and Jones participated in here, the absence of any evidence that they were particularly immature or that they failed to appreciate the risk of violence in committing an armed robbery, as well as the fact that Jordan and Jones were members of criminal street gangs, this is simply not a case like *Dillon* where the felony murder was the result of the actions of an immature youth who did not foresee the risks inherent in his behavior. As has long been acknowledged, "*Dillon*'s application of a proportionality analysis to reduce a first degree

felony-murder conviction must be viewed as representing an exception rather than a general rule." (*People v. Munoz* (1984) 157 Cal.App.3d 999, 1014.)

We agree with the trial court that, unlike *Dillon*, this is not a case "that is so unusual and mitigating, either the crime or the defendants, that the statutory mandated sentence by the Legislature is unconstitutional." Therefore, we reject Jordan's and Jones's argument that their sentences are grossly disproportionate under either the federal or state Constitutions.

D. Franklin *Requires a Remand to the Trial Court to Consider Whether Defendants Were Afforded a Sufficient Opportunity to Make a Record of Information Relevant to Their Eventual Youth Offender Parole Hearings*

In their supplemental briefing after this matter was transferred for us to consider the cause in light of *Franklin*, *supra*, 63 Cal.4th 261, each of the defendants argue that *Franklin* requires that we remand to the trial court for the limited purpose of considering whether they were afforded a sufficient opportunity to make a record of information relevant to their eventual youth offender parole hearings, and if not, to afford them the opportunity to make such a record.

Under section 3051, subdivision (b)(3), each of the defendants is eligible for release on parole during his 25th year of incarceration at a youth offender parole hearing. "The Legislature has declared that '[t]he youth offender parole hearing to consider release shall provide for a meaningful opportunity to obtain release' (§ 3051, subd. (e)) and that in order to provide such a meaningful opportunity, the Board [of Parole Hearings] 'shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity' (§ 4801,

subd. (c))." (*Franklin*, *supra*, 63 Cal.4th at p. 283.) "In directing the Board to 'give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner' (§ 4801, subd. (c)), the statutes also contemplate that information regarding the juvenile offender's characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board[of Parole Hearings'] consideration. For example, section 3051, subdivision (f)(2) provides that '[f]amily members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime . . . may submit statements for review by the board.' Assembling such statements 'about the individual before the crime' is typically a task more easily done at or near the time of the juvenile's offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away. [Citation.] In addition, section 3051, subdivision (f)(1) provides that any 'psychological evaluations and risk assessment instruments' used by the Board [of Parole Hearings] in assessing growth and maturity 'shall take into consideration . . . any subsequent growth and increased maturity of the individual.' Consideration of 'subsequent growth and increased maturity' implies the availability of information about the offender when he was a juvenile." (*Franklin*, at pp. 283-284.)

In *Franklin*, the defendant "was sentenced in 2011, before the high court's decision in *Miller* and before our Legislature's enactment of Senate Bill No. 260." (*Franklin*, *supra*, 63 Cal.4th at p. 282.) Under those circumstances, *Franklin* concluded "[i]t is not

clear whether Franklin had sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing." (*Id.* at p. 284.) The court therefore "remand[ed] the matter to the trial court for a determination of whether Franklin was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Ibid.*) *Franklin* explained that "[i]f the trial court determines that Franklin did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence. Franklin may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors. The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors (§ 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law . . . .' " (*Ibid.*)

Here, like the defendant in *Franklin*, Abernathy, Jones and Jordan were all sentenced before the Legislature enacted Senate Bill No. 260. Unlike in *Franklin*, the high court had already decided *Miller* at the time of the defendants' sentencings, and each

of the defendants did submit evidence during sentencing to support their arguments that their sentences should be reduced or mitigated because of their youth. However, because Senate Bill No. 260 had not been enacted and therefore the right to a youthful offender parole hearing did not yet exist, it is unclear whether the defendants "had *sufficient* opportunity to put on the record *the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing*." (*Franklin, supra,* 63 Cal.4th at p. 284, italics added.)

The Attorney General takes the position that during sentencing, Jordan, Jones and Abernathy were each afforded the opportunity to put on the record the kind of information that would be relevant at a youth offender parole hearing. This argument may or may not have merit. However, we do not evaluate it here. The trial court is in the best situation to make such an assessment, as it may review evidence and argument concerning the supplemental information that each of the defendants would propose to put on the record if they were afforded the opportunity to do so. That is the approach endorsed by our Supreme Court in *Franklin*, as it remanded with directions that *the trial court* consider the issue in the first instance.

Therefore, consistent with *Franklin*, we remand the matter for the trial court to determine whether defendants were "afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Franklin, supra,* 63 Cal.4th at p. 284.) If the trial court determines that any of the defendants did not have a sufficient opportunity, the trial court may receive the type of submissions and testimony described in *Franklin*, *supra*, at page 284, pursuant to the procedures identified therein,

and subject to the rules of evidence.

E. *Defendants' Presentence Custody Credit*

In each of their opening briefs, defendants argued that the trial court incorrectly calculated the applicable presentence custody credit pursuant to section 2900.5 in that it awarded 751 days of credit instead of 752 days. As defendants point out, they were arrested late on the night of May 11, 2011, and sentenced on May 31, 2013, which encompasses 752 days of presentence custody, but the trial court awarded only 751 days of presentence custody credit.

During the pendency of the appeal, Jones applied for and obtained an order from the trial court correcting the error. Accordingly, Jones's appeal on the presentence custody credits is moot, and we do not address it further.

However, Jordan and Abernathy did not apply for relief from the trial court. We have the authority on appeal to amend the judgment to award the correct amount of presentence custody credits. (*People v. Acosta* (1996) 48 Cal.App.4th 411, 427-428; *People v. Donan* (2004) 117 Cal.App.4th 784, 792-793.) Based on evidence that the three defendants were each in custody from May 11, 2011, to May 31, 2013, and the trial court's conclusion that Jones should have received an extra day of presentence custody credit, we conclude that Jordan and Abernathy are also entitled to an extra day of presentence custody credit. We accordingly modify the judgment to award Jordan and Abernathy 752 days of presentence custody credit instead of 751 days.

F. *Correction of Clerical Error in the Abstract of Judgment Regarding Jones's Sentence*

At sentencing, the trial court ordered that Jones's five-year sentence on count 4 for shooting at an occupied vehicle (§ 246) was to be stayed pursuant to section 654. However, the trial court's minute order and the abstract of judgment erroneously state that count 4 was ordered to run concurrently with the other counts.

The record of the trial court's oral pronouncement of sentence controls over a conflicting minute order or abstract of judgment. (*People v. Farell* (2002) 28 Cal.4th 381, 384; *People v. Mesa* (1975) 14 Cal.3d 466, 471.) Based on this principle, the Attorney General concedes that the abstract of judgment should be corrected to reflect the trial court's decision to stay the sentence on count 4. We accordingly direct that Jones's abstract of judgment be corrected to show that the trial court ordered that the sentence on count 4 be stayed pursuant to section 654.

DISPOSITION

As to Abernathy and Jordan, we direct the trial court to amend the abstract of judgment to award an additional day of presentence custody credit. As to Jones, we direct the trial court to amend the abstract of judgment to reflect that Jones's sentence on count 4 is stayed pursuant to section 654. As to all three defendants, this matter is remanded to the trial court to consider whether each was afforded a sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing, and if the trial court determines that any defendant did not have a sufficient opportunity, to allow the defendant to submit evidence to be placed on the record as described in

Franklin, supra, 63 Cal.4th 261, 284. The trial court shall forward the amended abstracts of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgments are affirmed.

IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.